SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

Number 883

■

HERMAN H. GRIEME, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

HAYDEN C. COVINGTON
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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Herman H. Grieme, presents this petition for writ of certiorari and shows unto the court as follows:

Summary of Matters Involved

1. Preliminary Statement.

The question presented in this petition upon the issues raised in the trial court and in the court below were presented to this court in the case of *Falbo* v. *United States*, 320 U. S. 549, but, as more fully appears in the statement, reasons relied upon for granting this petition for the writ, and in the accompanying brief, the precise question was not actually and expressly decided by this court in the *Falbo* case but that question was inadvertently overlooked

by the court in reaching its decision. (*Billings* v. *Truesdell*, — U. S. —, No. 215 Oct. Term 1943, decided March 27, 1944) The subsisting question on this petition for writ of certiorari calls upon this court to determine exactly when the registrant, classified as a conscientious objector in IV-E, is accepted by the administrative agency for performance of national service, and if, as and when the registrant is selected and assigned to do work of national importance, whether the process of selection is sufficiently terminated to qualify the petitioner for judicial review of the illegal classification of the administrative agency in defense to an indictment charging him with refusal to submit to induction and to accept assignment to national service under civilian direction. This is the identical proposition that was presented to this court in *Billings* v. *Truesdell*, supra, and which in that case was decided favorably to the petitioner upon like issues presented in this petition; and if the same judicial process is applied in the consideration of this petition, it must conclude that the administrative process was complete when the petitioner was accepted for service prior to his refusal to submit to induction.

2. Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals is not yet reported in the *Federal Reporter* but it appears in the record certified and is printed as an appendix to this petition for writ of certiorari at page 15, infra.

3. Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. Timeliness of the Petition.

The judgment of the Circuit Court of Appeals was entered on March 15, 1944. The petition for writ of cer-

tiorari is filed within thirty days from the date of entry of such judgment in said court.

5. Statutes and Regulations Involved.

The Selective Training and Service Act of 1940, as amended, Sections 3 (a), 5 (d), 10 (a), 11 (50 U. S. C. Appendix ss. 301-318); and Selective Service Regulations, Sections 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 627.22, 633.1, 633.2, 633.21, 642.41; there is presented also the construction and application of the Regulations as to when a conscientious objector in class IV-E is accepted for duty and for the performance of work of national importance, Sections 651.1-651.10; 652.10, 653.11 (c), 653.12. All of these regulations appear in 32 C. F. R. 1941 Supp.

6. Constitutional Provisions Involved.

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

7. Questions Presented.

(1) Does the acceptance by the local board for the performance of work of national importance at conclusion of the final-type physical examination whereby the petitioner was found physically and mentally qualified for the performance of such work constitute acceptance so as to complete the process of selection and allow judicial review of the illegal classification of petitioner in defense to the indictment charging him with failure to appear for induction, and accept the assignment?

(2) Was it necessary for petitioner to voluntarily submit to induction and become an inductee, in compliance with the order issued by the local board, as a condition precedent to judicial review of the illegal classification?

(3) Do the Selective Service Regulations fix the dividing line between civilian status of the conscientious objector and the status of an inductee at the time and place he appears for induction since there is no requirement for the taking of an oath as a condition to final acceptance of the selectee for work of national importance under civilian direction?

(4) Does the requirement of an assignee to appear for induction, after the process of selection and assignment has been completed, require petitioner to perform a vain, idle and immaterial act as a condition precedent to obtaining judicial review in violation of the due process clause of the Fifth Amendment to the United States Constitution?

(5) Since the process of selection had been completed prior to the issuance of the order to report for induction, the compliance with which required the petitioner to submit to induction, has the administrative process been sufficiently exhausted to enable the petitioner, in defense to the indictment, to show that he was not guilty and that the indictment was void because he was a minister of religion exempt from all duty of training and service and that the order of the board and the indictment based thereon was void because made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations?

(6) Did the trial court err in excluding evidence offered by petitioner to show that he was not guilty and that the indictment was void because it was based upon an order of the board made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) without support of substantial evidence, (e) contrary to the undisputed evidence, (f) arbitrarily and capri-

ciously, (g) contrary to the Constitution by depriving petitioner of rights and liberty without due process of law, and (h) in violation of the Regulations?

(7) Did the trial court err in charging the jury that it could not consider the question of whether or not petitioner was exempt as a minister and whether or not the draft board had acted in an arbitrary and unconstitutional manner, and that the only question to be decided was whether or not petitioner knowingly failed to report for induction over the objection of petitioner that he was denied his rights to a judicial trial contrary to the Fifth Amendment to the United States Constitution?

(8) Since the records before the Selective Service System show that petitioner was a duly recognized minister of religion under the Selective Training and Service Act and the Regulations thereunder, was he exempt from all training and service under the Act?

(9) Did the Selective Service System exceed its authority in classifying petitioner as liable for training and service and in ordering petitioner to report for induction in excess of the jurisdiction of said Selective Service System?

(10) Did the Selective Service System act arbitrarily and capriciously in classifying petitioner as liable for training and service when there was no evidence to show that he was not a minister of religion as claimed and the findings of the agency were contrary to the evidence?

(11) Should judicial review of the action of the administrative agency in ordering petitioner to report be had by trial *de novo* in so far as it affects the classification of petitioner?

8. How the Issues Were Raised.

The issues were raised by rulings of the court excluding evidence (Ap. 4-39); by exceptions to the court's charge (Ap. 40-43) and by motion in arrest of judgment. (Ap. 44) See the Assignments of Error. Ap. 88-95.

9. Statement of History of the Case and the Facts.

HISTORY

This criminal action was begun by an indictment[1] returned against Herman H. Grieme in the District Court of the United States for the District of New Jersey, at Newark, charging Grieme with an alleged violation of the Selective Training and Service Act of 1940, as amended. It was alleged in the indictment that Grieme was a registrant under the Act subject to the jurisdiction of Local Board No. 2 for Bergen County, New Jersey. That he was classified by said board as liable for training and service under the Act as a conscientious objector and assigned to do work of national importance in a Civilian Public Service camp, and ordered to report for induction into a Civilian Public Service camp. That Grieme unlawfully, willfully and feloniously, and contrary to his duty, failed and neglected to perform a duty imposed upon him under the Act by failing to report for induction.

Thereafter petitioner pleaded "not guilty", and on November 18, 1943, the trial to a jury began before Hon. Thomas F. Meaney, United States District Judge. (Ap. 4) The evidence was concluded on Thursday, November 18, 1943. (Ap. 4-39) The cause was argued to the jury on the same day. After the argument of counsel the court charged the jury. (Ap. 42-43) Petitioner duly objected and excepted to the charge of the court to the jury. (Ap. 43) The jury returned a verdict of "guilty". (Ap. 44) On Friday, December 3, 1943, for reasons expressed by the court, the petitioner was sentenced to three years' imprisonment and placed in the custody of the Attorney General. (Ap. 1) Grieme duly appealed to the court below. Ap. 1.

Petitioner duly filed his assignments of error. (Ap. 88-95) Thereafter a full transcript of the record, evidence and all proceedings was settled with the bill of exceptions upon

[1] The indictment is set forth *en hæc verba*, Ap. 2-3.

the trial. The transcript and bill of exceptions were timely filed in the court below. The cause was duly submitted to the Circuit Court of Appeals for decision. Upon the foregoing it is submitted that this court has jurisdiction to entertain this petition for writ of certiorari.

STATEMENT OF FACTS

Grieme duly registered with Local Board No. 2, Bergen County, New Jersey. He filed his questionnaire, containing all of the necessary information to properly classify him in class IV-D, sustaining his status as a minister of religion (Ap. 4-5), being one of Jehovah's witnesses, a recognized religious organization. (Ap. 45-53) At the same time Grieme also filed a conscientious objector form, to further clarify his ministerial status, which did not in any way militate against his right to classification and exemption as a minister of religion. The local board classified Grieme as a conscientious objector in class IV-E, denying, ignoring and disregarding his claim for exemption and classification in IV-D. Grieme thereupon appealed to the board of appeal. He was retained in class IV-E. Thereafter he was placed in Class III-A, still being denied his ministerial exemption and classification, and retained therein until January 1943, when he was again classified in class IV-E, from which he appealed and was retained therein by the board of appeal, ignoring and denying his claim for exemption and classification as a minister of religion, under the Act, Regulations thereunder and Opinion No. 14 of National Headquarters of Selective Service System with respect to classification of Jehovah's witnesses.

Petitioner's effort to show the reason for the juggling of his classification, and unwarranted denial of his rights by the local and appeal boards, was thwarted by the rulings of the trial court (Ap. 16) in denying Grieme's counsel the right to pursue the inquiry on cross examination of the Secretary of the local board, the Government's witness,

upon whom it relied to prove its case against defendant Grieme.

The full proof of Grieme's status as a minister of religion, submitted to the local board, is contained in the defendant's "Cover Sheet", Exhibit D-3, finally admitted in evidence by the trial court (Ap. 39), as the trial court stated, "The whole Cover Sheet bears upon the reason why this man asked to be classified as a Minister of the Gospel." Ap. 24.

Defendant's proof at the trial stands uncontradicted. (Ap. 20-39) His Cover Sheet, Exhibit D-3, contains copy of General Hershey's Opinion No. 14 concerning the ministerial status of Jehovah's witnesses (Ap. 45-53), certificate of ordination as company servant for Jehovah's witnesses, letters and duly verified statements (Ex. D-3; Ap. 54-87) of defendant and divers persons attesting to defendant's activity as an ordained minister of Jehovah's witnesses, showing that he performed duties and functions normally performed by ministers of orthodox churches, and that he was looked upon and regarded by others of Jehovah's witnesses in the same manner as are ministers of orthodox religious organizations; that he performed baptism, conducted Bible classes, preached from the public platform, acted as "company servant", respectively, of the Park Ridge (N. J.) and Nyack (N. Y.) companies of Jehovah's witnesses by appointment of the Watchtower Bible & Tract Society, legal governing body of Jehovah's witnesses. All of this is further attested to by the various ones of Jehovah's witnesses. Ap. 61-83, Ex. D-3.

The local board unwarrantedly sought to subject defendant Grieme to terms and conditions for him to submit to induction and the board to postpone action thereon, provided he consented to report for induction when called, regardless of evidence sustaining defendant's status as a minister of religion entitled to IV-D classification. (Ap. 6-7) Upon defendant's refusal to accede to such request, the

local board issued the order (Ex. G-2; Ap. 6) against him, in response to which defendant did report but refused to accept assignment at the induction station and thereupon refused to submit to induction, contending that his status as a minister of religion exempted him from induction and that the Order was void. His testimony proved not only such fact but his good-faith action, honest belief and conviction of his stand in the premises, which motivated him in his actions in answering the charge of the indictment; questioning the validity of the Order to Report, want of jurisdiction of the board, and no need to report for induction as a condition precedent to challenge such order.

Evidence submitted in his behalf was denied by the court (Ap. 21, *et seq.*) and in its charge to the jury. (Ap. 41) Whereby defendant was deprived of his liberty and denied due process of law, and otherwise suffered manifest wrong and injury, as pointed out in the argument.

Reasons Relied on for Allowance of Writ

Questions presented here are of national importance and seriously affect the life, liberty and rights of many thousands of persons who are exempt from all training and service under the Selective Training and Service Act of 1940.

The construction placed upon the Act and Regulations so as to require an exempt registrant to comply with all illegal orders of the administrative agency as a condition precedent to obtain judicial review, and to deny the petitioner the right to judicial review of the unconstitutional action of the agency because he refused to comply with the illegal order, is a decision on "a federal question in a way probably in conflict with applicable decisions of this court" so as to justify the granting of the writ of certiorari to review the judgment in this case.

The conclusion reached by the court below, that the

administrative process of selection had not been completed until the petitioner had reported for induction and submitted to induction, where the undisputed evidence and the Selective Service Regulations established without question that the process of selection of petitioner as a conscientious objector and his assignment to do work of national importance had been completed and preceded the order to report for induction, is in direct conflict with the opinion of this court in the case of *Billings, Petitioner*, v. *Truesdell, Major General*, No. 215, October Term 1943 (decided April 3, 1944), holding that the administrative process was completed when the registrant was selected for the performance of duty in the armed forces and that it was not necessary to submit to induction in order to exhaust the remedies allowed under the Act as a condition to relief.

Here the imposition of the requirement that petitioner submit to induction as condition precedent to judicial review illegally requires petitioner to perform a vain, idle and immaterial gesture which has no connection with the administrative process of selection and imposes an unreasonable and arbitrary restraint upon the right of judicial review in much the same way as if the court had required that petitioner first qualify himself for judicial review by walking a tightrope, submit to public ducking, or do some other unreasonable act designated for performance by him for entitling the petitioner to the right to contest the illegal classification. The decision in the *Falbo* case did not expressly lay down the rule that a registrant must submit to induction before qualifying for judicial review of the illegal classification. It was expressly held that the administrative process was not complete until the acceptance of the registrant for service had taken place.

In this court's *Falbo* decision it was inferred that the acceptance of a conscientious objector did not take place until he was received at the CPS camp after reporting for

induction. This conclusion, although an inference from the opinion, is manifestly error and based upon inadvertent confusion of the selective process of registrants classified for training and service in the armed forces and the process implied with reference to registrants classified as conscientious objectors in IV-E. The acceptance for service of men classified for service in the armed forces under the old regulations did not take place until the registrant was examined by officers of the armed forces at the induction station. Under the Regulations the selective process as to conscientious objectors assigned to work in Civilian Public Service camps was altogether different because the selection was made after the final-type physical examination made prior to induction. The process of selecting registrants classified IV-E as conscientious objectors, under the Regulations as they existed in 1943, is very much the same as the present process of selecting registrants who are classified for training and service in the armed forces. Instead of being selected simultaneously with their induction, they are given a preinduction physical examination at least twenty-one days before the induction notice is sent and acceptance is made now long before the order to report is issued; therefore the administrative process for the purpose of qualifying for judicial review is concluded at the acceptance which takes place at the preinduction physical examination or, in the case of a conscientious objector (prior to recent amendment), when the final-type physical examination showed that the registrant was qualified mentally and physically for work in a CPS camp.

Petitioner here challenges the correctness of the decision of this court in the case of *Falbo* v. *United States,* 320 U. S. 549, and insofar as it may be argued to control any of the questions here presented the court is requested to reconsider the doctrine announced in that decision because it is completely out of harmony with and repugnant to the Constitution and prior decisions of this court.

In connection with the foregoing challenge to the decision of this court in the *Falbo* case, the court is referred to the arguments made on behalf of Nick Falbo in his motion for leave to file a second petition for rehearing in *Falbo* v. *United States*, 320 U. S. 549, and all of the arguments therein made are incorporated herein by reference as though copied at length in this petition.

Petitioner also refers the court to arguments appearing under Point ONE of the BRIEF filed by petitioners in support of the petitions for writs of certiorari in the cases of *Clayton* v. *United States* and *Stull* v. *United States*, companion cases filed simultaneously with this petition.

This matter is further discused under the headings "PRELIMINARY" and "Clarification by 'Billings' Opinion", in the BRIEF filed by other petitioners, supporting their petitions for writs of certiorari in the cases of *Lohrberg* v. *Nicholson* and *Falbo* v. *Kennedy*, which are companion cases and filed simultaneously with this petition. That discussion also is made a part hereof by reference as though copied at length herein.

For additional grounds supporting the petition for writ of certiorari in this case, petitioner here refers to and incorporates each of the grounds asserted in each of the petitions for writs of certiorari filed simultaneously with this petition in the cases of *Clayton* v. *United States, Stull* v. *United States, Lohrberg* v. *Nicholson*, and *Falbo* v. *Kennedy*.

Supporting Brief

Since this petition is filed as a companion petition to the petitions for writs of certiorari filed in the *Clayton, Stull, Lohrberg* and *Falbo* cases just mentioned, and since the issues here presented are thoroughly discussed in the supporting briefs filed by the petitioners in those causes, reference is here made to the above described supporting briefs and also to the argument appearing in the motion for leave to file second petition for rehearing in the case of *Falbo* v. *United States,* 320 U. S. 549, and in that second petition for rehearing.

It is submitted that grave and substantial questions are presented which need a determination by this court after full argument by counsel in open court; and to this end the petition for writ of certiorari as hereinafter prayed for should be granted.

WHEREFORE your petitioner prays that this court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that upon due consideration the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

HERMAN H. GRIEME, *Petitioner*

By HAYDEN C. COVINGTON
WILLIAM V. AZZOLI
Counsel for Petitioner

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 8544, October Term 1943.

UNITED STATES OF AMERICA

v.

HERMAN H. GRIEME, *Defendant-Appellant*

Appeal from the District Court of the United States for the District of New Jersey.

Before BIGGS, JONES and MCLAUGHLIN, *Circuit Judges.*

OPINION OF THE COURT
[Filed March 15, 1944]

PER CURIAM:

Judgment is affirmed upon the authority of *Falbo* v. *United States,* [320] U. S. [549].

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 883

HERMAN H. GRIEME, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was indicted in the United States District Court for the District of New Jersey for wilfully and knowingly failing to perform a duty required of him under the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U. S. C. App. 301–318), in that he failed to report for work of national importance as required by an order duly issued to him by his local Selective Service Board pursuant to his classification in Class IV–E as a conscientious objector to both combatant and noncombatant military service (R. 2a–3a).

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The Government proved at the trial that petitioner had been classified IV–E as a conscientious objector and that he had failed to report for work of national importance in accordance with an order of his local board (R. 4a–8a). In his own defense petitioner testified that he had failed to comply with the Board's order because "I am a minister of the Gospel and I am entitled to the classification as such, and my right as a minister under the Selective Service law, I refused to report to their induction because I believe that I am entitled to that classification" (R. 31a).

The court instructed the jury that the propriety of petitioner's Selective Service classification was not an issue for its determination and that the sole question before it was whether petitioner had been ordered to report for work of national importance and whether he knowingly and wilfully refused to report (R. 41a–42a).

Petitioner was convicted (R. 44a) and sentenced to imprisonment for three years (see R. 1a). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed *per curiam* upon the authority of *Falbo* v. *United States*, 320 U. S. 549 (R. 97–98).

The instant case is on all fours with the *Falbo* case. Petitioner recognizes this, but he contends that in the *Falbo* case this Court inadvertently failed to determine the precise point at which a conscientious objector completes the administrative process so as to entitle him to challenge the

propriety of his classification in the courts. Petitioner argues that on the basis of this Court's decision in *Billings* v. *Truesdell,* No. 215, decided March 27, 1944, the process in the case of a conscientious objector is complete when he has passed the final type physical examination, and that since petitioner had proceeded that far, he was entitled to challenge the propriety of his classification in the criminal prosecution. (Pet. 1–2, 9–12.)[1] This argument, however, fails to recognize the significance of the distinction between the procedure formerly prescribed for the induction of registrants classified for military service and the process still prevailing for the assignment of persons classified as conscientious objectors to work of national importance. Formerly, as the Court noted in the *Billings* case, the prospective inductee did not receive the final type examination until he reported at the induction station pursuant to the induction order of his local board. In the case of a registrant classified as a conscientious objector, however, the final type examination is an intermediate step preceding the order to report for work of national importance, and even if the registrant successfully completes the examination, he is still subject to rejection when he subsequently reports to a civilian public

[1] Petitioner's argument is predicated upon his view of the *Billings* decision as holding that in the case of a registrant selected for military service the administrative process is complete when he passes the final type examination and is accepted preparatory to induction (see Pet. 9–10).

service camp.[2] Hence, as the Court said in the *Falbo* case, "in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp." (320 U. S., at 553.) Petitioner's contention that he had exhausted the administrative process is thus foreclosed by the *Falbo* decision.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
Special Assistant to the Attorney General.

IRVING S. SHAPIRO,
Attorney.

MAY 1944.

[2] As the Court pointed out in the *Billings* case, substantially the same procedure for preinduction examination has since been adopted in respect of registrants classified for military service (slip opinion, pp. 9–10). For a discussion of the procedure for selection of conscientious objectors for work of national importance, see pp. 44, 56 of the Government's brief in the *Falbo* case, No. 73.

U. S. GOVERNMENT PRINTING OFFICE: 1944